

# Everything You Always Wanted to Know About Official Support to Non-Federal Entity Fundraisers<sup>1</sup>

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## Introduction

Army ethics counselors<sup>2</sup> persistently face the problem of determining the extent to which commanders may officially support fundraising efforts of non-federal entities.<sup>3</sup> Official support to fundraisers can be a particularly challenging area because the provisions of the *Joint Ethics Regulation (JER)* appear to conflict, in some instances, with other rules regulating support to fundraisers. Federal statutes and regulations, Executive Orders, Department of Defense (DOD) Directives and Instructions, Department of Army (DA) regulations, and opinions interpreting these rules all impact upon the issue.

This article recommends an analytical method for evaluating requests for official support to non-federal entity fundraisers. It also provides examples to illustrate the mechanics of the analysis and defines non-federal entities. The article then overviews the rules and regulations that ethics counselors should consult when advising commanders. It also discusses opinions issued by the DOD Standards of Conduct Office (DOD SOCO), the DA Standards of Conduct Office (DA SOCO), the Office of Personnel Management (OPM), and the Office of Government Ethics (OGE). These opinions provide the ethics counselor invaluable assistance in interpreting the various rules that concern fundraising. Finally, to eliminate conflicting provisions of the rules, this article suggests changes to DA and DOD regulations. These changes would increase consistency among the opinions of ethics counselors. Political fundraising is outside the scope of this article.

## Analytical Method

How should an ethics counselor respond to a commander who seeks legal authority to provide official support to a fund-

raising event? This article suggests that the ethics counselor follow a five-step analysis:

*Step One*—Is the event sponsored by a non-federal entity?

*Step Two*—If the event is sponsored by a non-federal entity, what type of non-federal entity is it?

*Step Three*—Does the event fit the regulatory definition of a fundraiser? Could the ethics counselor legitimately characterize the event as something other than a fundraiser?

*Step Four*—Is the non-federal entity requesting actual support, or merely requesting permission to have its fundraiser on the military installation?

*Step Five*—Does a statute, regulation, or directive either authorize official support or further restrict official support?

### *Step One:*

#### *Is the Event Sponsored by a Non-Federal Entity?*

Both non-federal and federal entities may raise funds on military installations. When federal entities conduct the fundraisers, commands are subject to significantly fewer restrictions on their ability to support the events. For example, an installation's public affairs office may sponsor an open house.<sup>4</sup> The installation's morale, welfare, and recreation fund (IMWRF) may sell tickets to the event. Even though the ticket sales produce funds for the IMWRF, this event is not considered a non-federal entity fundraiser because the IMWRF is a federal non-appropriated fund entity.<sup>5</sup> Ethics counselors generally distinguish the IMWRF's activities by referring to its ventures as "events" rather than "fundraisers." An ethics counselor can

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1. And Then Some . . . .

2. The term "ethics counselor" generally refers to those Department of Defense (DOD) attorneys who are appointed in writing to "assist in implementing and administering the [DOD] Component command's or organization's ethics program and to provide ethics advice to [DOD] employees . . ." U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, para. 1-214 (30 Aug. 1993) [hereinafter JER].

3. See *infra* note 29 and accompanying text (defining non-federal entities).

4. See, e.g., U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION: MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES, para. 7-48(2) (25 Oct. 1998) (discussing open houses, primarily a public affairs event, in the context of installation morale activities) [hereinafter AR 215-1].

5. See *id.* para. 3-1a. Every nonappropriated fund activity legally exists as an instrumentality of the United States.

conclude the analysis at this step if he discovers he is dealing with an official event that happens to produce funds. Official support may be provided because there is no non-federal entity involved.

*Step Two:*

*If the Event is Sponsored by a Non-Federal Entity,  
What Type of Non-Federal Entity Is It?*

Commands may provide different types of support to different kinds of non-federal entities. The second step requires that the ethics counselor determine whether the non-federal entity requesting the support is covered by *JER* paragraph 3-210<sup>6</sup> or *JER* paragraph 3-211.<sup>7</sup> This determination is important because the *JER* authorizes commands to officially endorse the fundraising and membership drives of organizations that fit within *JER* paragraph 3-210. Although the word “support” is not men-

tioned in *JER* paragraph 3-210, ethics counselors often interpret *JER* paragraph 3-210 to include support. Likewise, DOD SOCO interprets the term “endorse” in this provision to mean “endorse and officially support.”<sup>8</sup>

In addition to examining the nature of the fundraising organization, ethics counselors should inquire into the use of the generated funds. An organization not actually listed in *JER* paragraph 3-210 may still qualify for official endorsement under that provision. A DOD employee may officially endorse a fundraising event sponsored by an “unlisted” organization if it will be donating all funds raised to certain listed organizations.<sup>9</sup>

If the organization does not qualify for support under *JER* paragraph 3-210, the ethics counselor must then determine if the fundraiser is “charitable” and, thus, eligible for official logistical support.<sup>10</sup> If the non-federal entity does not fit within

6. *JER*, *supra* note 2, para. 3-210. Paragraph 3-210 allows endorsement of several specifically mentioned non-federal entities, including the Combined Federal Campaign (CFC) and Army Emergency Relief (AER). The *JER*, subparagraph 3-210a(6), additionally includes:

[O]ther organizations composed primarily of DOD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members or their dependents when approved by the head of the DOD Component command or organization after consultation with the [Deputy Agency Ethics Official] or designee.

*Id.* para. 3-210a(6). *JER* paragraph 3-210 organizations are not subject to the provisions of *JER* paragraph 3-211. *See id.* para. 3-210a.

7. *Id.* para. 3-211. Paragraph 3-211 describes official logistical support to non-federal entities. *JER* subparagraph 3-211a describes a seven-pronged test that allows a commander to determine whether to provide logistical support to non-federal entity events but does not apply to support for non-federal entity fundraising or membership drives. The seven prongs are:

- (1) The support does not interfere with the performance of official duties and would in no way detract from readiness;
- (2) DoD community relations with the immediate community and/or other legitimate DoD public affairs or military training interests are served by the support;
- (3) It is appropriate to associate DoD, including the concerned Military Department, with the event;
- (4) The event is of interest and benefit to the local civilian community, the DoD Component command or organization providing the support, or any other part of DoD;
- (5) The DoD Component command or organization is able and willing to provide the same support to comparable events that meet the criteria of this subsection and are sponsored by other similar non-Federal entities;
- (6) The use is not restricted by other statutes (see 10 U.S.C. 2012 (reference (f)) which limits support that is not based on customary community relations or public affairs activities) or regulations; and
- (7) No admission fee is charged (beyond what will cover the reasonable costs of sponsoring the event) is charged for the event, no admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the portion of the event supported by DoD, or DoD support to the event is incidental to the entire event in accordance with public affairs guidance.

*Id.*

*JER* subparagraph 3-211b allows the commander to provide official support to charitable fundraising events when the first six of the seven prongs in *JER* subparagraph 3-211a are met and the non-federal entity is not affiliated with CFC or, if affiliated, the Director, OPM, does not object to the event. The OPM has no objection to fundraising events that do not occur in the federal workplace, as determined by the commander.

8. *See* DOD SOCO Advisory, Dep’t. of Defense Office of General Counsel, Standards of Conduct Office, No. 97-09, para. 1 (8 July 1997) available at <[http://www.defenselink.mil/dodgc/defense\\_ethics/ethics\\_issues/ADVIS709.HTM](http://www.defenselink.mil/dodgc/defense_ethics/ethics_issues/ADVIS709.HTM)> [hereinafter DOD SOCO Advisory No. 97-09]. As a result of receiving and denying many fundraising requests from DOD organizations, OPM asked DOD SOCO to clarify the applicable regulations. DOD SOCO issued this advisory in response to OPM’s request. *See id.* The advisory states that “DOD personnel and organizations may officially raise funds for those organizations listed in [para.] 3-210 of the *JER*. These organizations include ‘on-base organizations’ (organizations composed primarily of DOD employees or their dependents when fundraising among their own members for the benefit of their own members).” *Id.* This language indicates, for example, that an on-post fundraiser sponsored by a Girl Scout troop consisting of soldiers’ family members would qualify for official support. An on-post fundraiser sponsored by the Officer Wives’ Club would also qualify. Does this mean the commanding general (CG) may now officially encourage federal workers to buy Girl Scout cookies on an installation? A literal reading of the advisory may cause one to conclude that the CG could do so. Because the advisory interprets *JER* paragraph 3-210 very liberally, proceed with caution when relying on it.

9. *See* Memorandum, Dep’t of Defense Office of General Counsel, Standards of Conduct Office, subject: Guidance Regarding Military Ball Fundraisers and Similar Events (14 Mar. 1996) (on file with author). When a fundraising event donates all the contributed funds to the organizations listed in *JER* subparagraphs 3-210a(1) through (5), DOD employees “may officially endorse and attend the event in an official capacity.” *Id.* para. 1.

*JER* paragraph 3-210, and is not engaged in charitable fundraising pursuant to *JER* subparagraph 3-211b, the ethics counselor may conclude that the command cannot provide official support to the fundraiser. Nevertheless, the ethics counselor should still consider the impact of the remaining steps in the five-step analysis, explained below, before opining that official support is not authorized.

*Step Three:*

*Does the Event Fit the Regulatory Definition of a Fundraiser?*<sup>11</sup>

*Could the Ethics counselor Legitimately Characterize the Event as Something Other Than a Fundraiser?*

Merely because people are charged an admission fee to attend an event does not necessarily mean that the event is a fundraiser under the *JER*.<sup>12</sup> As discussed in the first step of this analytical model, when the government, as opposed to a non-federal entity, charges persons to attend a function, the function is referred to as an “event” rather than a “fundraiser.” Similarly, when government employees set up a collection box for canned goods or clothing in a public area, the *JER* fundraising restrictions are inapplicable.<sup>13</sup> Employees would not be deemed to be “fundraising” under the *JER* if they organized an Angel Tree<sup>14</sup> charitable gift program during the holiday season.<sup>15</sup>

Furthermore, charging individuals an admission fee to attend an event does not automatically make the event a fundraiser. If the admission charge is solely for the purpose of covering the reasonable costs of holding the event, the event is not a fundraiser under *JER* subparagraph 3-211b; rather, it is an “event” under *JER* subparagraph 3-211a.<sup>16</sup> In this situation, an ethics counselor can advise based on the analysis in *JER* subparagraph 3-211a, without regard to the more limiting fundraising restrictions found in *JER* subparagraph 3-211b.

*Step Four:*

*Is the Non-Federal Entity Requesting Actual Support, or Merely Requesting Permission to Have Its Fundraiser on the Military Installation?*

Non-federal entities may use an installation’s “category C” morale, welfare, and recreation (MWR) facilities<sup>17</sup> for fundraising events.<sup>18</sup> Arguably, the government’s participation by providing the opportunity to fundraise may not be characterized as “official support” of the event.<sup>19</sup> Appropriately, the government can be viewed as simply engaging in a business transaction. Conversely, if the non-federal entity requests use, free of charge, of the installation golf courses, bowling lanes, or clubs, the request is a request for “official support.” In that instance, the installation is foregoing funds for the benefit of the benevolent purposes of the non-federal entity.

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10. See *JER*, *supra* note 2, para. 3-211b. This provision allows commanders to provide official logistical support to charitable fundraisers that meet certain criteria. For a discussion of “charitable” activities, see *infra* notes 107-08 and accompanying text.

11. For purposes of the *JER*, fundraising means:

[T]he raising of funds for a nonprofit organization, other than a political organization as defined in 25 U.S.C. § 527(e), through: (i) Solicitation of funds or sale of items; or (ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

5 C.F.R. § 2635.808(a)(1) (1999).

12. For example, a non-federal entity can charge an admission fee designed to cover the reasonable costs of the event and still fit within the parameters of the less-restrictive provisions of *JER* subparagraph 3-211a, which is inapplicable to fundraisers. See *JER*, *supra* note 2, para. 3-211a(7).

13. See 5 C.F.R. § 950.102(b). Combined Federal Campaign regulations do not apply to “the collection of gifts-in-kind, such as food, clothing and toys, or to the solicitation of Federal employees outside of the Federal workplace as defined by the applicable Agency Head consistent with General Services Administration regulations and any other applicable laws or regulations.” *Id.*

14. An “Angel Tree” is a holiday tree containing cards with details as to the specific needs of underprivileged persons in the community. Donors can select an individual and provide items, such as books, shoes, clothes, and toys, responsive to the needs of that particular person.

15. The *JER* definition of fundraising differs significantly from the Army’s regulatory definition. See U.S. DEP’T OF ARMY, REG. 600-29, PERSONNEL—GENERAL: FUNDRAISING WITHIN THE DEPARTMENT OF THE ARMY, para. 1-5c(3) (20 Mar. 1992) [hereinafter AR 600-29]. The Army’s current definition of fundraising is “any activity conducted for the purpose of collecting money, goods or other support for the benefit of others.” *Id.* glossary, sec. II. Therefore, AR 600-29 would apply to the Angel Tree program.

16. See *supra* note 12 and accompanying text. The DOD may provide logistical support to events other than fundraisers and membership drives when:

No admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the event, no admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the portion of the event supported by DOD, or DOD support to the event is incidental to the entire event in accordance with public affairs guidance.

*JER*, *supra* note 2, para. 3-211a(7). Commanders must also find that the events meet the remaining six prongs of *JER* subparagraph 3-211a.

17. See AR 215-1, *supra* note 4, para. 6-2i. Category C MWR activities include golf courses, bowling centers, clubs, skating rinks, and similar social and recreational activities. See *id.* para. 4-1c, fig. 4-1.

*Step Five:*

*Does a Statute, Regulation, or Directive Either Authorize Official Support or Further Restrict Official Support?*

The last step in the analysis is the most challenging. Having passed all the other hurdles, the ethics counselor has concluded that the situation presented is one where a non-federal entity is engaging in fundraising as defined in the *JER*. At this point, to opine that the command may provide official support, the ethics counselor must find a statute, regulation, or directive that authorizes the official support. The command cannot provide official support in the absence of such authority.<sup>20</sup>

*Applying the Analysis*

*Example*—The Field Artillery Association (FAA), a non-profit organization, sponsors an annual Saint Barbara's Holiday Ball, in honor of the patron saint of the field artillery. For purposes of this example, assume that the FAA does not qualify for official support under *JER* subparagraph 3-210a(6). Assume also that the FAA charges fifteen dollars per ticket, which will cover only the estimated costs of the event. These costs include a meal prepared by the officers' club, a category C MWR facility. The FAA requests the use of the officers' club for the event and also requests the official assistance of a few Redlegs<sup>21</sup> to pull the lanyard (that is, fire the cannon) signaling the start of the event. May the command provide the support? The ethics counselor should apply the five-step analysis.

*Step One*—The FAA, a non-federal entity, is sponsoring the event.

*Step Two*—The FAA is not one of the organizations listed in *JER* paragraph 3-210; therefore, *JER* paragraph 3-211 applies.

*Step Three*—*JER* subparagraph 3-211a applies because the ball is an event, not a charitable fundraiser.

*Step Four*—The request to use the officers' club for the function is not a request for official support. The FAA will pay the officers' club, a category C MWR activity, for the meals provided.<sup>22</sup> However, the FAA request for Redleg assistance is a request for official support. Therefore, that portion of the request requires analysis under *JER* subparagraph 3-211a.

*Step Five*—The *JER*, at subparagraph 3-211a, provides authorization for support to the Redleg event. To utilize this authority, the command must determine that the seven factors listed in 3-211a are met. This subparagraph authorizes support. Likewise, no other statutes or regulations restrict the support.

*Example*—The Association of the United States Army (AUSA) requests to have a golf tournament on the installation golf course. Funds raised will benefit AUSA programs. They also request that soldiers distribute AUSA flyers and install AUSA banners at the golf course before the event. What support may the installation commander legally provide?

*Step One*—The event is sponsored by AUSA, a non-federal entity.

*Step Two*—AUSA is not one of the organizations listed in *JER* paragraph 3-210; therefore, *JER* paragraph 3-211 applies.

*Step Three*—This event would not qualify as a "charitable" fundraiser since the funds raised are to benefit AUSA rather than a charity. Therefore, to qualify for support, the event must meet the seven-prong test of *JER* subparagraph 3-211a.<sup>23</sup> It does not meet the seventh prong because the purpose of the event is to make money above and beyond the costs of the event

18. *Army Regulation 215-1* does not differentiate between private organizations operating on an installation and non-federal entities. See *id.* "Private organizations authorized to operate on an installation may participate in that installation's special events and activities, subject to the provisions of this regulation and *AR 210-1*." *Id.* para. 6-2j. The old regulation went on to state that "non-DOD organizations are authorized to use Category C MWR facilities for fund-raising purposes as long as they follow the regulatory guidelines contained in *AR 210-1* and *AR 600-29*." *Id.* para. 6-2k. The drafters of subparagraph 6-2k apparently did not notice that *AR 210-1* (now also rescinded) applied only to on-post private organizations, and not to "[private organizations] operating outside of DA installations that request use of Army space or facilities." U.S. DEP'T OF ARMY, REG. 210-1, INSTALLATIONS: PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS, para. 1-1b(1) (14 Sept. 1990) [hereinafter *AR 210-1*]. *Army Regulation 210-1* was rescinded by Memorandum, Assistant Chief of Staff for Installation Management, CFSC-SP, subject: Policy Governing Private Organizations on Army Installations (20 Apr. 1998) (on file with author) [hereinafter ACSIM memo].

19. For example, a command and an on-post, private organization may co-host an art exhibition in the officers' club and split the gate receipts. "MOAs/MOUs with military units or on-post private organizations . . . are authorized for the operation of MWR resale booths at MWR events." The old regulation stated that before October 1998, *AR 215-1* distinguished between private organizations and non-federal entities. See UNITED STATES DEP'T OF ARMY, REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES (29 Sept. 1995) (now rescinded) [hereinafter *Rescinded 215-1*]. *AR 215-1*, *supra* note 4, para. 7-48a(4).

20. See 5 C.F.R. § 2635.808(b) (1999). "An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation, or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties." *Id.*

21. Field Artillerymen. During the Mexican War, artillery uniforms had a two-inch stripe on the trousers and horse artillerymen wore red canvas leggings. The nickname of Field Artillery soldiers, Redlegs, came from this clothing. See Field Artillery Proponency Office, *United States Army Field Artillery* (visited 31 Mar. 1998) <[http://sill-www.army.mil/tngcmd/ldr/tcl\\_fa1.htm#MEXICAN](http://sill-www.army.mil/tngcmd/ldr/tcl_fa1.htm#MEXICAN)>.

22. See *AR 215-1*, *supra* note 4, para. 8-16b(7)(a)(g). Individuals who are nonmembers of military clubs are nevertheless authorized to attend functions in those clubs hosted by on-post, private organizations. The regulation does not reference the *JER* as applying to this determination. See *id.*

and the soldiers would provide more than just incidental support. Therefore, the commander may not approve the request for soldier support. Remember, however, the analysis does not end here.

*Step Four*—If AUSA compensates the installation for the use of the golf course, that portion of the request may be granted without consideration of *JER* subparagraph 3-211a. It is not a request for official support.<sup>24</sup> If AUSA was requesting use of the golf course at no cost, the request would be for official support.

*Step Five*—No other statute, directive, or regulation exists that allows the requested soldier support.

*Example*—The local chapter of the American Red Cross, an organization affiliated with the Combined Federal Campaign (CFC), requests to have a fundraising bowl-a-thon at the installation bowling lanes. The local chapter requests that the installation commander waive any fees for the day of the tournament so that they may reap the maximum benefit of the fundraiser. The bowl-a-thon will be open to the public, including DOD personnel, but does not specifically target DOD personnel. May the installation commander provide official support to the fundraiser by waiving the fees?

*Step One*—The local chapter of the American Red Cross, a non-federal entity, is sponsoring the event.

*Step Two*—The American Red Cross is not one of the organizations listed in *JER* paragraph 3-210; therefore, *JER* paragraph 3-211 applies.

*Step Three*—The event fits within the regulatory definition of a charitable fundraiser; consequently, *JER* subparagraph 3-211b applies. Therefore, to qualify for support, the event must meet the first six prongs of *JER* subparagraph 3-211a. It clearly does. Additionally, *JER* subparagraph 3-211b requires OPM permission to provide official support to charitable fundraising events when the sponsoring organization is affiliated with CFC and the fundraising occurs in the federal workplace. The federal workplace includes the entire military installation; however, the installation commander may designate certain areas on

the installation (like the bowling alley) to be outside of the federal workplace for fundraising purposes.<sup>25</sup> Additionally, the Army's position is that OPM approval is not necessary when the fundraiser does not target federal employees.<sup>26</sup> Therefore, OPM approval is unnecessary.

*Step Four*—This is a request for official support. Only if the local chapter were paying for the use of the bowling lanes would the request fall outside the ambit of "official support."

*Step Five*—Since there are no other applicable restrictions, the commander may authorize official support.

*Example*—The Better Opportunities for Single Soldiers Program (BOSS) plans to have a chili cook-off on the installation to raise funds for a youth Easter egg hunt. What support can the command provide?

*Step One*—BOSS is not a non-federal entity; it is a category B MWR activity.<sup>27</sup> Because it is a federal entity, the *JER* restrictions on support to non-federal entities are inapplicable. Official support can be provided. After ensuring that this activity is appropriate under applicable regulations,<sup>28</sup> the ethics counselor need proceed no further in the analysis.

## Non-Federal Entities Defined

### Definition

The *JER* provides a specific definition of a non-federal entity:

A non-Federal entity is generally a self-sustaining, non-Federal person or organization, established, operated and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees or agents of the federal government. A non-Federal entity may operate on DOD installations if approved by the installation commander or higher authority under applicable regulations.<sup>29</sup>

23. See *supra* note 7.

24. See *supra* note 19 and accompanying text.

25. See *JER*, *supra* note 2, para. 3-211b.

26. See Memorandum, Dep't. of the Army Standards of Conduct Office, to Staff Judge Advocate, U.S. Forces Command, Fort McPherson, Georgia, subject: Support of Local Non-Federal Entity Fundraising Events, para. 3 (3 Feb. 1994) (on file with author).

27. See AR 215-1, *supra* note 4, para. 8-20c.

28. The Army specifically permits BOSS to charge fees for events. See *id.* para. 8-20c(2). The funds raised may be used to support community service projects, such as an Easter egg hunt. See U.S. DEP'T OF ARMY, CIR. 608-97-1, PERSONAL AFFAIRS: BETTER OPPORTUNITIES FOR SINGLE SOLDIERS PROGRAM, para. C-2b (29 Aug. 1997).

29. *JER*, *supra* note 2, para. 1-221.

The term “non-federal entity” was not one commonly used by Army ethics counselors before the *JER* was implemented. Army attorneys used *AR 210-1* (now rescinded)<sup>30</sup> and *AR 600-50*<sup>31</sup> as their primary authorities when advising commanders regarding support of fundraisers sponsored by “private organizations.” The term “private organization” is not used in the *JER*.<sup>32</sup> Often, the terms “private organization” and “non-federal entity” are used interchangeably, which may cause confusion to the uninitiated.<sup>33</sup> Recently, however, DOD reissued the instruction that had served as the basis for the Army’s former regulation on private organizations, *AR 210-1*.<sup>34</sup> The superseded instruction conflicted with the *JER*.<sup>35</sup> The revised instruction further clarifies the definition of “private organization.”<sup>36</sup> It also restates the long-standing prohibition against private organization competition with nonappropriated fund instrumentalities.<sup>37</sup>

When analyzing questions concerning official support to non-federal entities, the ethics counselor must first decide what type of non-federal entity is in issue. Following the rescission of *AR 210-1*, the most logical way to categorize the non-federal entity is to decide whether it fits into *JER* paragraph 3-210 or *JER* paragraph 3-211.

*JER Paragraph 3-210 Non-Federal Entities*<sup>38</sup>

Many organizations that the Army has traditionally supported fit into this category. It may include private organizations such as officer wives’ clubs, thrift shops, and museum associations; informal funds;<sup>39</sup> family support groups (FSGs);<sup>40</sup> and other similar groups organized to support the morale of soldiers, employees, and family members.

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30. *AR 210-1*, *supra* note 18.

31. U.S. DEP’T OF ARMY, REG. 600-50, PERSONNEL—GENERAL: STANDARDS OF CONDUCT FOR DEPARTMENT OF THE ARMY PERSONNEL (28 Jan. 1988). This regulation has been superseded by the *JER*.

32. The *JER* may be accessed through the World Wide Web and digitally searched at <[http://www.defenselink.mil/dodgc/defense\\_ethics/ethics\\_regulation/jerch1/](http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/jerch1/)>. A search on the phrase “private organization” resulted in no hits.

33. The confusion exists because Army attorneys frequently misused the general term “private organization” to refer to a specific sub-element of private organizations: those that had received permission from the installation commander to operate on the military installation. The terms “non-federal entity” and “private organization” actually had the same meaning. The Army’s policies apply to “the authorization and operation of private organizations (POs) operating on Army installations, and official participation by DA agencies, commands, and personnel in the activities of POs and associations, regardless of whether they operate on or off DA installations.” *AR 210-1*, *supra* note 18, para. 1-1a. This paragraph clarifies that organizations operating off the military installation are POs; however, only on-post POs are subject to the organizational rules in *AR 210-1*. See *supra* note 18.

34. See U.S. DEP’T OF DEFENSE, INSTR. 1000.15, PRIVATE ORGANIZATIONS ON DOD INSTALLATIONS (23 Oct. 1997) [hereinafter DODI 1000.15].

35. See Memorandum, Dep’t. of Defense Office of General Counsel, Standards of Conduct Office, to Designated Agency Ethics Officials and Deputy Designated Agency Ethics Officials, subject: Red Cross Fundraising Raffle (3 Mar. 1995) (on file with author). This memorandum stated that a Red Cross raffle had been approved in accordance with DODI 1000.15, *supra* note 34. It noted that the fundraiser should not have been approved because DODI 1000.15 conflicted with the *JER*.

36. The revised DODI 1000.15, *supra* note 34, defines private organizations as “[s]elf-sustaining and non-federal entities, incorporated or unincorporated, which are operated on DOD installations with the written consent of the installation commander or higher authority, by individuals acting exclusively outside the scope of any official capacity as officers, employees, or agents of the federal government.” *Id.* para. 3.2. Under this revised definition, private organizations are now a subset of non-federal entities. Non-federal entities may exist both on and off the military installation; those that operate on-post are “private organizations.” Compare this definition to the definition formerly used by the Army. See *supra* note 33.

37. The revised DODI states: “A private organization covered by this instruction that offers programs or services similar to either appropriated or nonappropriated fund activities on a DOD installation shall not compete with, but may, when specifically authorized in the approval document, supplement those activities.” DODI 1000.15, *supra* note 34, para. 6.4.

38. *JER*, *supra* note 2, para. 3-210. See *supra* note 6.

39. Informal funds are funds such as office coffee funds and cup and flower funds. These funds may operate on a military installation without formal authorization because of their limited scope. See DODI 1000.15, *supra* note 34, para. 6.15. The Army’s guidance for informal funds is contained in the memorandum rescinding *AR 210-1*. See ACSIM memo, *supra* note 18, enclosure 4. The Army issued further guidance clarifying that local installation commanders have discretion to place dollar limits on the net worth of informal funds. See Memorandum, Assistant Chief of Staff for Installation Management, CFSC-SP, subject: GC Notes No. 30 (22 Jan. 1999) (February 1999 notes to Army garrison commanders) (on file with author) [hereinafter GC Notes]. The DOD does not put a dollar limit on the amount of net worth informal funds may accumulate. See DODI 1000.15, *supra* note 34, para. 6.15.

40. See U.S. DEP’T OF ARMY, PAM 608-47, PERSONAL AFFAIRS: A GUIDE TO ESTABLISHING FAMILY SUPPORT GROUPS (16 Aug. 1993) [hereinafter DA PAM 608-47]. The pamphlet defines a family support group (FSG) as a “command sponsored vehicle for people within the unit to help each other.” *Id.* para. 1-7.

As mentioned previously,<sup>41</sup> DOD SOCO has indicated that these organizations may qualify for official support for their fundraising activities. Further, provided the listed organizations are fundraising on a military installation, DA SOCO has indicated that they qualify for official support even when raising funds outside of their specific membership.<sup>42</sup>

### *JER Paragraph 3-211 Non-Federal Entities*<sup>43</sup>

If a non-federal entity fundraiser does not qualify for official support under *JER* paragraph 3-210, the ethics counselor may still be able to advise the commander that official support is appropriate under *JER* subparagraph 3-211b. Generally, organizations ineligible for support under *JER* paragraph 3-210 may qualify for support under *JER* paragraph 3-211. For example, a fundraiser sponsored by a charitable veterans' organization could qualify for official support under *JER* paragraph 3-211. Other charitable organizations in the local community may also be entitled to support.<sup>44</sup>

## **Rules and Regulations**

### *Decide What Rules Apply*

After an ethics counselor characterizes the type of organization and event in question, he must examine the applicable rules. In this area, the *JER* has not lived up to its promise of

being a "one-stop shop" for ethics counselors.<sup>45</sup> The *JER*, although helpful, provides just enough guidance in paragraphs 3-210 and 3-211 to send an ethics counselor in the right direction.

### *Rules to Consult for JER Paragraph 3-210 Organizations*

A good place to start is *JER* subparagraph 3-210(b), which lists a number of rules that apply to fundraising.

### *Federal Rules*

Several rules on fundraising apply throughout the Executive Branch:

5 C.F.R. § 2635.808<sup>46</sup>—This regulatory provision is the basic, fundamental restriction on official support to fundraising. It applies to federal employees in the Executive Branch. It defines fundraising<sup>47</sup> and sets parameters on the fundraising activities of employees. Soliciting funds for a nonprofit organization, selling items, and participating in a charitable event are all covered by this provision.<sup>48</sup> It allows employees to participate in fundraising in their official capacities if they are authorized to engage in fundraising as part of their official duties.<sup>49</sup> In August 1997, DOD SOCO issued guidance interpreting 5 C.F.R. § 2635.808.<sup>50</sup>

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41. See *supra* note 7 and accompanying text.

42. See Information Paper, Dep't. of the Army Standards of Conduct Office, subject: Family Support Group (FSG) Fundraising, para. 2d (8 Aug. 1995) (on file with author) [hereinafter DA FSG Information Paper]. The author, Mr. Al Novotne, agrees with DOD SOCO's interpretation that *JER* paragraph 3-210 authorizes both official support and official endorsement. He provides the example of a family support group having an on-post bake sale. When the FSG is fundraising, it is considered a non-federal entity. Mr. Novotne states that the post commander could authorize official support, such as the use of Army equipment or the release of soldiers from duty to attend the event. See *id.* He interprets the phrase "fundraising among their own members" in *JER* subparagraph 3-210a(6) to mean fundraising on the installation, among members of the military community. See *id.* Therefore, an officer wives' club bake sale on the installation fits within *JER* subparagraph 3-210a(6) even though sales are being made to persons not members of the club.

43. *JER*, *supra* note 2, para. 3-211. See *supra* note 7.

44. See U.S. DEP'T OF ARMY, REG. 360-61, ARMY PUBLIC AFFAIRS: COMMUNITY RELATIONS, para. 12-2b (15 Jan. 1987) [hereinafter AR 360-61]. The installation commander can provide Army support to local fundraising events if he decides that providing the support is part of the responsible role of the post in the local community. The regulation provides three examples of non-federal entities which could be eligible for such support: a volunteer fire department, a rescue squad, and a youth organization fund drive. These fundraisers could qualify for official support because they benefit the entire community. See *id.* This regulation also gives installation commanders the discretion to authorize Army speaker participation in local fundraising events. See *id.* para. 4-1c. The regulation specifically limits fundraising concerts by military bands. The Department of the Army may grant exceptions upon determining that a concert benefits an entire community. See *id.* para. 12-2d.

45. See *JER*, *supra* note 2, para. 1-100 (stating that the *JER* provides a single source of standards of ethical conduct and ethics guidance).

46. 5 C.F.R. § 2635.808 (1999). See also Memorandum from Mr. Stephen D. Potts, Director, U.S. Office of Government Ethics, to Designated Agency Ethics Officials, subject: Fundraising Activities (Aug. 25, 1993) (discussing recurring issues associated with fundraising) (on file with author).

47. See *supra* note 11.

48. See 5 C.F.R. § 2635.808(a)(1). Participating in the event is specifically defined to mean "active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line." *Id.* § 2635.808a(2). An employee who merely attends a charitable function is not considered to be fundraising unless the employee knows his or her attendance is being used to promote the event. See *id.* An employee making a speech at a fundraising event is considered to be fundraising, unless delivering an "official speech" about agency policies. See *id.*

*Executive Order 12,353*<sup>51</sup>—This Executive Order sets out the foundational rules for the CFC, which involves on-the-job solicitation of federal employees and soldiers.<sup>52</sup>

5 C.F.R. § 950<sup>53</sup>—The language in Executive Order 12,353 comports with 5 C.F.R. § 950, the CFC regulations. The CFC is the “only authorized solicitation of employees in the Federal workplace on behalf of charitable organizations.”<sup>54</sup> The CFC rules allow agencies to establish procedures for “solicitations conducted by organizations composed of civilian employees or members of the uniformed services among their own members for organizational support or for the benefit of welfare funds for their members.”<sup>55</sup> The CFC rules are inapplicable to the collection of gifts-in-kind<sup>56</sup> and to the solicitation of federal employ-

ees outside the federal workplace.<sup>57</sup> The rules also allow for solicitation of federal employees, outside the CFC, for emergency and disaster appeals. Agencies must get the OPM director’s permission before allowing these solicitations.<sup>58</sup>

### *DOD Rules*

In addition to *DODI 1000.15*, the ethics counselor can consult a number of other DOD references:

*DOD Directive 5035.1*<sup>59</sup>—This directive quotes the language in the Executive Order indicating the CFC rules do not apply to internal fundraising. The directive differs significantly from

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49. See *id.* § 2635.808(b). The authorization must emanate from a statute, executive order, regulation or other agency determination. See *supra* note 20. When authorized to participate in an official capacity, an employee may use his or her official title, position, and authority. See *id.* § 2635.808(b).

50. See Memorandum, Dep’t of Defense Office of General Counsel, Standards of Conduct Office, to General Counsels of the Military Departments et al., subject: Guidance on Analyzing Invitations to DOD Officials to Participate in Fundraising Activities and to Accept Gifts Related to Events (18 Aug. 1997) (on file with author). The author concludes:

[A] DOD official should decline an invitation to serve, in his official capacity, as the chairperson or honorary chairperson of a fundraising event for an organization that is not authorized under Section 3-210 of the *JER*. Serving in such a position clearly constitutes fundraising, which is not allowed under the regulations. These invitations seek the visibility of the DOD official and his name to help solicit attendance and money for the event. Participating under these circumstances would also constitute an unauthorized endorsement of the organization’s fundraising.

There are only two exceptions under which a DOD employee could be associated with a fundraising event in her official capacity. First, under 5 C.F.R. § 2635.808(a)(2), an employee may merely attend a fundraising event as long as the organization does not use the fact of her attendance to promote the event.

Second, under 5 C.F.R. § 2635.808(a)(2) & (3), an employee may deliver an official speech, which is one given in an official capacity on a subject matter that relates to her official duties. This may include the employee’s own official duties; the responsibilities, programs, or operations of the agency, or matters of Administration policy on which the employee is authorized to speak. The employee may not request donations or any other support for the organization. Further, the employee’s agency must first determine that the event provides an appropriate forum for the dissemination of the information.

*Id.* The opinion, however, also states that DOD policy disfavors official speeches at fundraisers, stating that official speeches may only be given “if a more appropriate forum is not available and the DOD information needs to be disseminated within a certain time period.” *Id.*

51. Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (1982).

52. The Executive Order is not applicable to all fundraising:

This Order shall not apply to solicitations conducted by organizations composed of civilian employees or members of the uniformed services among their own members for organizational support or for the benefit of welfare funds for their members. Such solicitations shall be conducted under policies and procedures approved by the head of the Department or agency concerned.

*Id.* sec. 7. Compare this provision with the language in *JER* subparagraph 3-210a(6). The *JER* provision is broader than the scope of the Executive Order in that it expands eligibility to participate in the fundraising activity. While the Executive Order states its inapplicability to fundraising by service members and employees, *JER* para. 3-210a(6) includes fundraising by “organizations composed *primarily* of DOD employees or their dependents . . . .” *JER*, *supra* note 2, para. 3-210a(6) (emphasis added). See *supra* notes 6, 8.

53. 5 C.F.R. § 950 (1999).

54. *Id.* § 950.102(a).

55. *Id.* § 950.102(d). These solicitations are exempt from the CFC rules. Additionally, they do not require permission of the Director of OPM. See *id.*

56. See *id.* § 950.102(b).

57. See *JER*, *supra* note 2, para. 3-211b (defining the federal workplace to include the entire DOD installation and granting the local commander authority to designate areas on the installation that are considered to be outside of the federal workplace for fundraising purposes).

58. See 5 C.F.R. § 950.



the current version of 5 C.F.R. § 950 in that it indicates the definition of fundraising includes the use of food and toy collection boxes.<sup>60</sup>

*DOD Instruction 5035.5*<sup>61</sup>—This instruction sets out the rules for the CFC campaign in overseas areas. It is similar to *DOD Directive 5035.1*.

*DOD Directive 5410.18*<sup>62</sup>—This old, but still applicable, directive limits official DOD support of fundraisers from the community relations perspective.<sup>63</sup> A commander at the local level does, however, retain the authority to support fundraising events of interest and benefit to the entire local community.<sup>64</sup>

*Joint Ethics Regulation Paragraph 3-209*<sup>65</sup>—This provision prohibits official endorsement and preferential treatment of non-federal entities other than those listed in *JER* paragraph 3-210.

### Army Rules

The ethics counselor should also consult the applicable Army-specific regulations:

*Army Regulation 600-29*<sup>66</sup>—*Army Regulation 600-29* authorizes four types of fundraising within DA: fundraising for

CFC; fundraising for Army Emergency Relief (AER); locally-authorized fundraising; and religious fundraising.<sup>67</sup>

There is an apparent discrepancy between the language found in the *JER* and the language in *AR 600-29*. As mentioned above,<sup>68</sup> the *JER*, and the opinions that interpret it, indicate that DOD employees can endorse and support fundraising for certain non-federal entities composed primarily of DOD employees and dependents.<sup>69</sup> *Army Regulation 600-29* contains similar language, but further indicates that the only fundraising within the Army that may be conducted for the morale of soldiers is the AER campaign.<sup>70</sup> Army Emergency Relief fundraising is specifically listed in the *JER* at subparagraph 3-210a(3), which implies that fundraising other than AER is authorized by *JER* subparagraph 3-210a(6).

Fundraising events for organizations other than CFC and AER cannot be conducted during any time period that conflicts with those campaigns.<sup>71</sup> *Army Regulation 600-29* also indicates that no organizations, other than CFC and AER, may solicit for funds during duty hours in the federal workplace.<sup>72</sup> Yet, several of the opinions discussed previously indicate that fundraising for those organizations covered by *JER* subparagraph 3-210a(6) is official fundraising and may be conducted on the federal installation. Arguably, insofar as *AR 600-29* can be considered as supplementing the *JER* on this point, the *JER* supersedes it.<sup>73</sup>

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59. U.S. DEP'T OF DEFENSE, DIR. 5035.1, FUNDRAISING WITHIN THE DEPARTMENT OF DEFENSE (28 Aug. 1990) [hereinafter DOD DIR. 5035.1]. This directive addresses fundraisers for military relief organizations such as AER, and states that such fundraisers cannot conflict, in any way, with the CFC. See *id.* para. C-6. It also states fundraising by private voluntary organizations in the workplace is limited, but does not indicate how it is limited, other than stating that fundraising activities in public areas of the installation, such as the sale of poppies by veterans organizations or the use of collection boxes for toys or food, are permissible. See *id.* para. C-7.

60. See *id.* para. C-7. See also *supra* note 13.

61. U.S. DEP'T OF DEFENSE, INSTR. 5035.5, DOD COMBINED FEDERAL CAMPAIGN - OVERSEAS AREA (17 Aug. 1990).

62. U.S. DEP'T OF DEFENSE, DIR. 5410.18, COMMUNITY RELATIONS (3 July 1974) (C1, 10 June 1976). See *id.* sec. V, para. C (mandating a policy requiring denial of armed forces support to fundraising events or projects benefiting a single cause).

63. See *id.* para. C-1 (stating that the policy exists because it is impossible for the government to support all worthwhile organizations). Support to such organizations is provided through the CFC; any other support is limited as being inconsistent with the basic policy underlying the CFC. *Id.* The directive also specifically limits DOD participation in air shows and concerts that have a fundraising purpose. See *id.* paras. C-4, C-5.

64. See *id.* para. C-6.

65. *JER*, *supra* note 2, para. 3-209.

66. *AR 600-29*, *supra* note 15.

67. See *id.* para. 1-5.

68. See *supra* notes 6, 8.

69. See *JER*, *supra* note 2, para. 3-210a(6).

70. See *AR 600-29*, *supra* note 15, para. 1-5b.

71. See *id.* para. 1-6. Additionally, the regulation provides that fundraising activities for other organizations cannot in any way substantially interfere with the CFC and AER campaigns. See *id.*

72. See *id.* para. 1-10.

*Army Regulation 600-29* also discusses other fundraising activities commanders can authorize locally. These include sales of tokens, such as poppies or lapel flags, by veterans' organizations, and the use of collection boxes in public areas of federal buildings.<sup>74</sup> Current OPM guidelines specifically exclude the collection of gifts-in-kind from their coverage.<sup>75</sup>

*Army Regulation 600-29* limits official endorsement of fundraisers. Department of the Army personnel may officially endorse only the CFC and AER campaigns, other fundraisers specifically approved by OPM, and local fundraising on behalf of Army MWR nonappropriated fund instrumentalities.<sup>76</sup>

*DA Pamphlet 608-47*<sup>77</sup>—Family support groups often have both an official and a non-official component. Unit FSGs are a “command sponsored vehicle for people within the unit to help each other.”<sup>78</sup> The unit commander’s mission includes direct support to the unit FSG.<sup>79</sup> Army regulations clearly contemplate the FSG operating at times as an arm of the command, even authorizing appropriated fund support for “official” FSG volunteers.<sup>80</sup> Commanders must provide family support systems with sufficient resources to accomplish their missions.<sup>81</sup>

Not every activity of the FSG fits within this umbrella of officiality, however. Family support group funds may be characterized as informal funds or private organizations.<sup>82</sup> Reading these rules consistently, FSGs are “quasi-official.” They are treated as non-federal entities when engaged in fundraising<sup>83</sup> or other non-official activities (that is, socials, parties, and the like); yet they are treated as official when they are engaged in traditional FSG duties. Therefore, an ethics counselor must not immediately turn to Chapter 3 of the *JER*<sup>84</sup> when advising on activities of FSGs. Ethics counselors should consult Chapter 3 only after determining that the FSG members are acting in an unofficial capacity and the FSG is in non-federal entity mode. An ethics counselor should only apply the restrictions found in Chapter 3 when the FSG is involved in activities such as fundraising.

*Army Regulation 215-1*<sup>85</sup>—*Army Regulation 215-1* discusses several different aspects of fundraising. The regulation prohibits nonappropriated fund activities from engaging in charitable fundraising activities.<sup>86</sup>

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73. The foreword to the *JER* states:

All DOD Component regulations implementing these canceled DOD Directives, and all provisions of other DOD Component regulations, directives, instructions, or other policy documents that are not consistent with this Regulation, will be canceled . . . . The supersessions of this paragraph take effect immediately and will be announced by each DOD Component.

*JER*, *supra* note 2, foreword.

74. See AR 600-29, *supra* note 15, para. 1-5c(3).

75. See 5 C.F.R. § 950.102(b) (1998). See also *supra* note 13.

76. See AR 600-29, *supra* note 15, para. 1-9. The regulation defines “endorsement” to include support such as public appearances made in conjunction with campaign kickoffs and the use of name, title, and position in routine communications designed to promote the fundraising activity. See *id.* According to this regulation, Army personnel may not officially endorse local fundraising activities other than those engaged in by MWR activities. The regulation also states that Army officials may not endorse private organization fundraising activities under AR 210-1. See *id.* This language conflicts with *JER* subparagraph 3-210a(6), which allows official endorsement of certain non-federal entity fundraising activities.

77. DA PAM 608-47, *supra* note 40.

78. *Id.* para. 1-7.

79. See *id.* para. 1-8b.

80. See *id.* para. 3-6c (authorizing support for training and travel, reimbursement of incidental expenses, and awards, banquets, and mementos).

81. See U.S. DEP’T OF DEFENSE, DIR. 1342.17, FAMILY POLICY, para. D-5 (30 Dec. 1988).

82. See DA PAM 608-47, *supra* note 40, para. 3-7a. This paragraph also states that FSG funds of a net worth exceeding \$1000 will be treated as private organizations. In light of a recent Army change, however, the \$1000 cap is no longer applicable and local commands may establish dollar limits on informal funds at the command’s discretion. See GC Notes, *supra* note 39. Additionally, FSGs should not be organized as a private organization. See *id.*

83. See DA FSG Information Paper, *supra* note 42, para. 2b.

84. *JER*, *supra* note 2, ch. 3 (regulating activities with non-federal entities).

85. AR 215-1, *supra* note 4.

86. See *id.* para. 4-12d. Specifically, “NAFIs do not contribute to or engage in fundraising activities for charities, foundations, and similar organizations nor collect or disburse donations of a private or personal nature.” *Id.*

Although NAFIS may not engage in charitable fundraising, the regulation indicates that non-federal entities may use certain MWR facilities for fundraisers. Private organizations authorized to operate on an installation may operate resale booths at the installation MWR events and activities when the private organizations enter into a memorandum of agreement with the NAFI.<sup>87</sup> Such activity arguably is not considered support of the private organization.<sup>88</sup>

*Army Regulation 215-1* prohibits routine MWR patronage by members of private organizations who are not otherwise authorized.<sup>89</sup> Non-federal entities, however, may fundraise in category C MWR facilities,<sup>90</sup> provided they comply with the *JER*, *DODI 1000.15*, and *AR 600-29*.<sup>91</sup> When an on-post private organization sponsors a function in a military club, the private organization may invite members of the public who are neither members of the club nor members of the private organization. All attendees at functions sponsored by on-post private organizations in military clubs are authorized use of the club.<sup>92</sup> For fundraisers by on-post private organizations, however, participation is limited to private organization members and invited guests.<sup>93</sup> Additionally, an authorized patron may use MWR catering services for these events.<sup>94</sup> In category C facilities, and in accordance with applicable regulations, private organizations may be allowed to fundraise using bingo<sup>95</sup> and

casino games.<sup>96</sup> *Army Regulation 215-1* also allows non-federal entities to fundraise in conjunction with sports events.<sup>97</sup>

*Army Regulation 360-61*<sup>98</sup>—*Army Regulation 360-61* is also a good reference regarding fundraising, especially fundraising for local entities. It allows official Army support for fundraising campaigns authorized by *AR 600-29*; other fundraising appeals authorized by the President or OPM; and fundraising efforts of military service aid societies; and limited local fundraising events.<sup>99</sup>

*Army Regulation 930-4*<sup>100</sup>—This regulation sets out the specific rules for fundraising for the AER campaign. In addition, it authorizes special AER fundraising events such as marathons, walk-a-thons, car washes, sports competitions, carnivals, and bake sales.<sup>101</sup>

#### *Rules to Consult for JER Paragraph 3-211<sup>102</sup> Organizations*

As previously mentioned, *JER* subparagraph 3-211a regulates the provision of official logistical support to events sponsored by non-federal entities, while *JER* subparagraph 3-211b addresses support for fundraising and membership drives that fall outside the scope of *JER* paragraph 3-210.<sup>103</sup> *Joint Ethics*

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87. See *id.* para. 7-48a(4).

88. The former MWR Regulation specifically stated that such special events co-hosted with on-post, private organizations is not to be construed as support to a private organization. See Rescinded AR 210-1, *supra* note 18, para. 7-48c(1)(b). The new regulation, however, does not include such specific language. See AR 215, *supra* note 4, para. 7-48.

89. See AR 215-1, *supra* note 4, para. 6-2i.

90. See *id.* para. 4-1c, fig. 4-1. Category C MWR activities are those which generate enough income to cover most of their expenses, such as golf courses, clubs, bowling centers, rod and gun activities, and food and beverage operations. *Id.*

91. See *id.* para. 6-2i. See also *supra* notes 17, 18.

92. See *id.* para. 8-17b(7)(g).

93. See *id.* para. 8-17e(7)(f).

94. See *id.* para. 8-17c(2)(c). This paragraph also authorizes the use of MWR catering services by authorized patrons for any event sponsored by a non-DOD organization, not just on-post, private organization events.

95. See *id.* para. 8-7f.

96. See *id.* para. 8-9d.

97. See *id.* para. 8-17e(7)(f) (authorizing fundraising by civilian sports organizations at MWR sports events consistent with the *JER*).

98. AR 360-61, *supra* note 44.

99. See *id.* para. 12-2.

100. U.S. DEP'T OF ARMY, REG. 930-4, SERVICE ORGANIZATIONS: ARMY EMERGENCY RELIEF (30 Aug. 1994).

101. See *id.* para. 5-3g.

102. See *JER*, *supra* note 2, para. 3-211a (providing a seven-prong test for commanders to use to determine when official logistical support may be provided to non-federal entity events). This provision does not apply to fundraisers. *Id.* See also *JER*, *supra* note 2, subpara 3-211b (giving guidance on when official support may be provided to fundraisers).

*Regulation* subparagraph 3-211b<sup>104</sup> allows commanders to provide logistical support to charitable fundraising events sponsored by non-federal entities. The commander must determine that the event meets the first six prongs of the test in *JER* subparagraph 3-211a. The commander must also determine that the non-federal entity is either not affiliated with the CFC or, if affiliated, the Director, OPM, has no objection to DOD support of the event.<sup>105</sup> Normally, the Director, OPM, will deny permission to support such events.<sup>106</sup> The *JER* specifically states, however, that OPM does not object to support of events that do not fundraise in the “federal government workplace,” which is determined by the local commander.<sup>107</sup> The *JER* additionally states that an installation commander may authorize fundraising on the military installation, on a limited basis.<sup>108</sup>

Ethics counselors must be able to assist commanders in answering the question: “What type of fundraising can I sup-

port under *JER* subparagraph 3-211b?” To approve support to these fundraisers, commanders must apply each of the tests set out in the first six prongs of *JER* subparagraph 3-211a.

Before an ethics counselor applies these six prongs, he must note that *JER* subparagraph 3-211b only authorizes a commander to approve *charitable* fundraising. Logically, since this provision is a DOD supplement, the ethics counselor must examine the basic paragraph of the federal rule it supplements to define “charitable.”<sup>109</sup> First and foremost, the commander must determine that the activity to be supported is *charitable* fundraising.<sup>110</sup>

Once the commander has determined that the fundraising is charitable in nature, he must ensure that the requested support qualifies under each of the six prongs referenced in *JER* subparagraph 3-211b.

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103. See *supra* note 7.

104. The regulation states:

The head of a DOD Component command or organization may provide, on a limited basis, the use of DOD facilities and equipment (and the services of DOD employees necessary to make proper use of the equipment), as logistical support of a charitable fundraising event sponsored by a non-Federal entity when the head of the DOD Component command or organization determines (1) through (6) of subsection 3-211.a of this Regulation, above, and the sponsoring non-federal entity is not affiliated with the CFC (including local CFC) or, if affiliated with the CFC, the Director, OPM, or designee, has no objection to DOD support of the event. OPM has no objection to support of events that do not fundraise on the Federal Government workplace (which is determined by the head of the DOD component command or organization).

*JER*, *supra* note 2, para. 3-211b.

105. See *supra* notes 53-58 and accompanying text.

106. See DOD SOCO Advisory No. 97-09, *supra* note 8, para 1.

In addition, we may officially render logistical support to charitable fundraising events in accordance with § 3-211 of the *JER*. Under this section, permission from OPM is required only if:

1. The organization is affiliated with the CFC;
2. The event raises funds, not gifts-in-kind such as food, clothing, or toys;
3. The event occurs outside of the CFC campaign season (Sept. 1 to Dec. 15), *and*;
4. The fundraising occurs in the federal workplace. (The federal workplace includes the DOD installation, although the installation commander may designate a public place on the installation where all similar groups may solicit funds.)

*Id.*

Bottom line: OPM, as a matter of policy, is denying requests for support of fundraisers . . . Savvy ethics officials may assist their clients not by seeking OPM permission, but by assisting their client to structure their fund-raising efforts so that they comport with the *JER* and 5 C.F.R. § 2635.808 yet do not require OPM approval.

*Id.*

107. See *JER*, *supra* note 2, para. 3-211b.

108. See *id.* para. 3-300a(2) (allowing the commander to designate areas in the federal workplace where DOD employees and dependents may fundraise). These areas include public entrances to buildings, community support facilities, and personal quarters. See *id.*

109. See *supra* notes 10, 11 and accompanying text. The supplemented provision, 5 C.F.R. § 2635.808 (1999), defines fundraising to include participation in events where “any portion of the cost of attendance or participation may be taken as a *charitable tax deduction* by a person incurring that cost.” *Id.* § 2635.808(a)(1)(ii) (emphasis added).

110. See, e.g., I.R.S. Pub. 526, (Rev. Nov. 1996). The Internal Revenue Service (IRS) allows charitable deductions for organizations such as nonprofit schools and hospitals; federal, state, and local governments; Boy Scouts, Girl Scouts, Red Cross, Goodwill Industries, Boys and Girls Clubs of America, and the like. See *id.* at 2. The IRS does not allow charitable deductions for fraternal orders, lodges, or other nonprofit groups such as civic leagues, social and sports clubs, labor unions, and chambers of commerce. See *id.* at 6. Additionally, the IRS does not consider groups whose purpose is to lobby for changes in the laws as charitable organizations. See *id.* at 7.

The first prong states: “The support does not interfere with the performance of official duties and would in no way detract from readiness.”<sup>111</sup> For example, posting soldiers in uniform during duty hours outside a local restaurant to sell raffle tickets to benefit the American Cancer Society would interfere with the performance of their official duties and, therefore, would be prohibited.

The second prong states: “DOD community relations with the immediate community and/or other legitimate DOD public affairs or military training interests are served by the support.”<sup>112</sup> To determine if this prong is met, compare the proposed fundraising with the types of local fundraising authorized in *AR 360-61*.<sup>113</sup> This prong would be met, for example, where the command desired to provide support to a fundraiser for a local rescue squad, volunteer fire department, or humane society. These organizations provide benefits for the entire local community, including soldiers and DA civilians.

The third prong states: “It is appropriate to associate DOD, including the concerned Military Department, with the event.”<sup>114</sup> Some organizations do not have core values similar to those of the Army. Army policy would not allow official support of a fundraiser, for example, that benefited extremist organizations or anti-military organizations.

The fourth prong states: “The event is of interest and benefit to the local civilian community, the DOD Component command or organization providing the support, or any other part of DOD.”<sup>115</sup> The first part of this prong, requiring that the event be important to the local civilian community, is very similar to the community-relations requirement of the second prong. However, this prong is broader in that the event may merely be

of interest to the organization providing the support or to another part of the military community.

The fifth prong states: “The DOD Component command or organization is able and willing to provide the same support to comparable events that meet the criteria of this subsection and are sponsored by other similar non-federal entities.”<sup>116</sup> Basically, this prong restates the long-standing prohibition against preferential treatment of non-federal entities.<sup>117</sup> The regulations simply do not allow a commander to “play favorites.” If the commander provides support to a golf tournament sponsored by the Museum Restoration Association to raise money for museum purposes, he should not deny a request for a similar fundraiser from the Museum Volunteers Association. Similarly, a commander who allows AUSA to come on the installation and conduct a charitable fundraiser should not deny a similar request from other military-related associations. This prong requires that commanders exercise diligence in their efforts to keep non-federal entity fundraising under control.<sup>118</sup>

The sixth prong states: “The use is not restricted by other statutes (see 10 U.S.C. § 2012 . . . which limits support that is not based on customary community relations or public affairs activities) or regulations.”<sup>119</sup> The referenced statute limits support to activities outside the DOD.<sup>120</sup> Pursuant to the statute, the military services may still support a wide variety of organizations under the umbrella of “customary community relations and public affairs activities.”<sup>121</sup> However, the organizations eligible for any other support is very limited. Not surprisingly, the organizations eligible for support are the same organizations that qualify as charitable under the IRS rules. Support may be provided only to governmental entities at the federal, regional, state, and local level; to the youth and charitable organizations specified in 32 U.S.C. § 508;<sup>122</sup> and to other entities the Secre-

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111. JER, *supra* note 2, para. 3-211a(1).

112. *Id.* para. 3-211a(2).

113. *See supra* note 44 and accompanying text.

114. JER, *supra* note 2, para. 3-211a(3).

115. *Id.* para. 3-211a(4).

116. *Id.* para. 3-211a(5).

117. *See* 5 C.F.R. § 2635.702 (1999). This provision includes prohibitions on the use of public office for private gain and the use of one’s government position to imply the government endorses private activities, products, or services. *See id.* *See also* JER, *supra* note 2, para. 3-209 (addressing endorsement and preferential treatment).

118. One way a commander can prevent fundraising from getting out of control on the installation is by generally not allowing any support to JER subparagraph 3-211b fundraisers. Because the organizations that provide the greatest benefits to the military community as a whole usually fit within the parameters of JER subparagraph 3-210a(6), a commander can avoid this problem by simply not allowing support to fundraisers under JER subparagraph 3-211b. Pandora’s box remains closed.

119. JER, *supra* note 2, para. 3-211a(6).

120. 10 U.S.C.A. § 2012 (West 1999). While this statute does not specifically mention fundraising, it does state support may only be provided to activities outside DOD if the assistance is authorized by another provision of law or if the assistance is incidental to military training. *See id.*

121. *Id.* § 2012(b)(1) (stating that the statute is not intended to limit these activities).

tary of Defense approves on a case-by-case basis.<sup>123</sup> The DOD Directive interpreting the new statute did not add any other organizations to the list of those eligible for support.<sup>124</sup>

Ethics counselors must also consider other limiting statutes, such as the restriction on military support to civilian sporting events.<sup>125</sup>

## Recommendations

### *At the DOD Level*

The recent revision to *DODI 1000.15* was a step towards eliminating confusion in the area of fundraising. The instruction precludes conflicts with the *JER* by simply referring to the *JER* rules throughout.<sup>126</sup> Instead of adopting the terminology of the *JER* (that is, non-federal entities), however, *DODI 1000.15* still refers to “private organizations.” That term is confusing because it is not in the *JER*.<sup>127</sup> The DOD could dramatically improve *DODI 1000.15* by characterizing organizations using the same dichotomy that exists in the *JER*: organizations entitled to the special treatment of *JER* paragraph 3-210, and organizations eligible for support under *JER* paragraph 3-211. The *DODI 1000.15* would much better serve its users by shedding the old terminology and adopting not only the *JER*’s rules, but also its language.

The DOD should also revise *JER* paragraph 3-210 to incorporate DOD SOCO’s interpretation of support to which non-

federal entities are entitled. Specifically, DOD SOCO has opined that non-federal entities are eligible for official support in addition to official endorsement.<sup>128</sup>

The DOD should also rewrite *JER* subparagraph 3-210a(6) to make it consistent with Executive Order 12,353 and 5 C.F.R. § 950 by deleting the word “primarily.”<sup>129</sup> Organizations with any members from outside DOD would fall under *JER* paragraph 3-211 rather than subparagraph 3-210a(6). Additionally, in *JER* subparagraph 3-210a(6), DOD should change the words “among their own members” to read “on the military installation,” since that is how the language is interpreted.<sup>130</sup> A statement reflecting the language of 5 C.F.R. § 950 that OPM permission is not necessary for fundraising pursuant to *JER* subparagraph 3-210a(6) would also benefit *JER* users.

The DOD should add a sentence to *JER* subparagraph 3-210a(6) stating that the covered organizations are not authorized to fundraise off the military installation. Keeping these fundraisers on the installation would prevent the perception that DOD is perpetually seeking a handout from the public, above and beyond the public’s contribution as taxpayers.

For example, no matter what name FSGs give themselves, the public views these groups as part of the DOD. Downtown merchants who see an advertisement soliciting commercial sponsorship<sup>131</sup> for a DOD event may not participate due to frequent solicitations for funds by FSGs. The merchant may understandably experience difficulty distinguishing the difference between donating to a FSG and providing commercial

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122. 32 U.S.C.A. § 508 (West 1999). Eligible organizations are limited to the Boy Scouts of America, the Girl Scouts of America, the Boys Clubs of America, the Girls Clubs of America, the Young Men’s Christian Association, the Young Women’s Christian Association, the Civil Air Patrol, the United States Olympic Committee, the Special Olympics, the Campfire Boys, the Campfire Girls, the 4-H Club, the Police Athletic League, and any other youth or charitable organization designated by the Secretary of Defense. *See id.* § 508d.

123. *See* 10 U.S.C.A. § 2012(e)(3).

124. U.S. DEP’T OF DEFENSE, DIR. 1100.20, SUPPORT AND SERVICES FOR ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE (30 Jan. 1997).

125. 10 U.S.C.A. § 2554 (specifying the amount and type of support DOD can provide to civilian sporting events).

126. For example, the instruction prevents sanction, endorsement, or support of private organizations except as authorized by the *JER*. *See* DODI 1000.15, *supra* note 34, para. 4. The instruction also requires fundraising and membership drives to comply with the *JER*. *See id.* para. 6.5. It states that logistical support to private organizations may only be provided in accordance with the *JER*. *See id.* para. 6.6. It states that the *JER* governs personal and professional participation in private organizations. *See id.* para. 6.7.

127. *See supra* notes 31, 32.

128. *See supra* notes 8, 9.

129. *See supra* note 52.

130. *See supra* note 42.

131. *See* AR 215-1, *supra* note 4, para. 7-47a.

Commercial sponsorship is the act of providing assistance, funding, goods, equipment (including fixed assets), or services to a MWR program(s) or event(s) by an individual, agency, association, company, or corporation, or other entity (sponsor) for a specific (limited) period of time in return for public recognition or opportunities for advertising and other promotions.

*Id.*

sponsorship to an official morale event. Prohibiting FSG fundraising outside the installation gate would likely result in long-term benefits to commercial sponsorship programs. Additionally, the DOD should revise *DOD Dir. 5035.1* to define fundraising consistently with the current definition in 5 C.F.R. § 950.

#### *At the DA Level*

Many of the documentation requirements in *AR 210-1* are no longer necessary. Because *AR 210-1* has been rescinded, ethics counselors should consider adopting the *JER* paragraph 3-210/3-211 dichotomy as suggested above. Non-federal entities with members from outside the DOD no longer need to file a constitution and by-laws with the installation. All organizations requesting support under *JER* paragraph 3-211 should be treated similarly. For instance, the downtown YMCA can qualify for official support under *JER* paragraph 3-211 without filing a constitution and by-laws. The booster club for an on-post school with members from outside the DOD community should be treated the same. The booster club should not be subjected to an audit and to filing requirements when an off-post organization can qualify for similar support without meeting those requirements. Logically, the DA should require financial reports, constitutions, and by-laws only from those organizations that benefit from the favored treatment bestowed by *JER* subparagraph 3-210a(6).

Neither the *JER* nor the revised *DODI 1000.15* place any dollar limits on informal funds.<sup>132</sup> If the DA adopts *JER* terminology and the *JER* paragraph 3-210/3-211 dichotomy in future private organization guidance, it should also provide a new definition for the term “informal funds.” The Army should continue to refrain from defining informal funds according to their net worth but should instead categorize them by the way they support themselves. Informal funds would be defined as those funds that do not “fundraise” in the traditional sense; rather, these funds are comprised solely of membership fees and dues. Examples are cup and flower funds, coffee funds, and holiday party funds supported solely by members who “chip in.” The DA should require all managers of informal funds that qualify under *JER* subparagraph 3-210a(6) and who seek to raise funds through methods other than payment of dues to provide financial documentation, regardless of their net worth.

The DA should also review the organization of FSG funds as currently described in *DA Pamphlet 608-47*. Family support groups would be exempt from the restrictions in the *JER* if they

were considered official morale support activities rather than non-federal entities. Similar to the BOSS<sup>133</sup> program and the United States Marine Corps FSG program,<sup>134</sup> the FSGs would qualify for nonappropriated fund support, and could also have on-post “events” to fill their coffers. With this change in philosophy, the restrictions in Chapter 3 of the *JER* would no longer apply to FSG “events.”

The DA should revise *AR 600-29* to bring it up to date with the *JER* and the current 5 C.F.R. § 950. Specifically, the regulation should adopt the policy of *JER* paragraph 3-210. In accordance with that policy, the DA should delete the current restriction in the regulation stating that AER is the only authorized fundraising in the Army among soldiers for their own welfare funds. If this were still a valid restriction, it would render *JER* subparagraph 3-210a(6) meaningless as applied to the Army. Just as the DOD should revise *DOD Directive 5035.1*, the Army should revise the definition of fundraising in *AR 600-29* so that it is consistent with the definition in 5 C.F.R. § 950. Also, the prohibition in *AR 600-29* against official endorsement of private organization fundraising activities should be restated so it is consistent with the *JER*.<sup>135</sup>

The DA should also revise *AR 215-1*. The regulation should adopt the *JER* paragraph 3-210/3-211 dichotomy and use the terminology of the *JER*. The DA should delete the term “private organization.” The DA should add a specific provision defining what activities constitute official support to a non-federal entity. If a non-DOD organization pays to use a category C MWR facility, is the organization receiving official DOD support? This matter merits clarification.

#### *At the Installation Level*

Commanders can take several precautions to ensure that only appropriate fundraisers receive official support. A commander should have specific, well-publicized channels set up to handle fundraising requests. Before approval, the commander should ensure that requests are staffed through the directorate of community activities, the ethics counselor, and the CFC point of contact. The commander should also implement a local policy that addresses approval procedures, designates specific public areas of the installation where fundraising is authorized, and advises potential participants of any local restrictions (for example, whether FSGs are allowed to fundraise off the installation). To prevent competition with the MWR Commercial Sponsorship Program, commanders should consider limiting the number of fundraisers each organization may have.

132. The Army removed the \$1000 cap on informal funds, giving discretion to local commanders to set limits. See *supra* note 18. Enclosure 4 to the ACSIM memo which rescinded *AR 210-1* (see *supra* note 17) retains the \$1000 limit on informal funds.

133. See *supra* notes 26, 27 and accompanying text.

134. The Marine Corps views FSGs as MWR activities rather than non-federal entities. Telephone Interview with Captain Joe Perlach, Office of the Staff Judge Advocate to the Commandant of the Marine Corps (9 Mar. 1998).

135. See *supra* note 76.

## Conclusion

Worthwhile charities are abundant. An individual's decision to support a particular charity is a highly personal and private matter. When the military services provide official support to non-federal entity fundraisers, the support is essentially being funded by a taxpayer who is given no opportunity to participate in the decision to support that particular charity. The numerous fundraising regulations exist to prevent the appearance that the military services are making preferential decisions as to which charities will receive their publicly-funded support.

A commander inundated with these rules can easily become frustrated trying to decide what official support he may provide. Ethics counselors' differing interpretations of these rules aggravate that frustration. A few simple changes to the *JER* and other applicable regulations would resolve these inconsistent opinions and enhance commanders' understanding of the rules regarding public support for private fundraisers.